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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 704

JAN HILLEGAS,

Petitioner,

—v.—

JOE SAMS, JR., County Attorney for Lowndes County, Mississippi, and PENN TAYLOR, Sheriff and Custodian of the County Jail of Lowndes County, Mississippi,

Respondents.

Petitioner's Reply Brief

[redacted]

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OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI

Respondents have moved to dismiss the petition for writ of certiorari in this habeas corpus proceeding on the ground that petitioner, released pending appeal herein, is presently not in the physical custody of the respondents. Nothing of this appears in the record;[1] petitioner's counsel brought the matter to the Court's attention in her petition for certiorari for the purpose of assuring the Court that there was no need for undue haste in consideration of the case. See page 8, n. 3, of the Petition. In any event, since

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[1] On the face of the record, it appears that petitioner is in respondents' custody. Her habeas corpus petition so alleged, see Appendix to Petition, page 15a; nothing to the contrary appears; and both courts below reached the exhaustion issue which petitioner seeks to present to this Court. See *id.*, pages 1a-14a. This alone is sufficient grounds for denial of respondents' motion to dismiss. See *Ex parte Catanzaro*, 138 F.2d 100, 101 (3d Cir. 1943).

even on the facts stated by respondents[3] it appears that petitioner's release pending appeal was effected by the action of the federal habeas corpus court itself, the claim that such release moots the proceeding is frivolous. *Eagles* v. *Samuels*, 329 U.S. 304 (1946); *e.g.*, *Reis* v. *United States*

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[3] The actual facts surrounding petitioner's release are as follows. Between the time of her arrest December 28, 1964 and the date of filing and denial of this habeas corpus petition January 5, 1965, petitioner was respondents' prisoner in the Lowndes County Jail. Following dismissal of her habeas corpus petition by District Judge Clayton on grounds of failure to exhaust state remedies, see Appendix to Petition, page 1a, petitioner's counsel asked Judge Clayton for a certificate of probable cause to appeal. Judge Clayton granted the certificate. Counsel then requested an order staying state prosecution of petitioner and releasing her on her own recognizance or nominal bail pending appeal. Judge Clayton said he did not think an order was necessary, that he believed the matter of stay and release could be amicably arranged with counsel for the respondents. Petitioner's counsel said he thought such an order desirable, in order to protect against possible claims of mootness on appeal. Judge Clayton pointed out that the record would not contain any grounds for a claim of mootness by respondents. Petitioner's counsel replied that, if respondents raised the issue on appeal, he could not in conscience fail to tell the Fifth Circuit and this Court that petitioner was at large. Judge Clayton said he would resolve that matter by obtaining an assurance from respondents' counsel that no claim of mootness would be raised on the appeal; this, he said, would dispense with the need for any formal order on his part releasing the petitioner. In the presence of petitioner's counsel, Judge Clayton then telephoned respondents' counsel, said that he wished the petitioner released, and obtained an assurance that this release would not be made the basis for a contention of subsequent mootness.

In violation of this assurance, respondents filed in the Court of Appeals, on the day of oral argument of the appeal, a motion to dismiss on the ground that petitioner was no longer in respondents' custody. The matter was raised by the Court in oral argument, and petitioner's counsel suggested that if the record were in any regard unclear, he would be pleased to have Judge Clayton supplement it by certifying the facts recited in the first paragraph of this footnote, which clearly brought the case within *Eagles* v. *Samuels*, 329 U.S. 304 (1946). The Court of Appeals saw no need for this; it did not dismiss the appeal; it decided it on the merits and did not bother to address respondents' mootness contention in its opinion.

Marshal, 192 F.Supp. 79, 83 (E.D. Pa. 1961). Respondents' motion to dismiss should be denied.

Respectfully submitted,

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